SUPREME COURT.

JULY TERM.

THURSDAY, July 11.

BEFORE MR. JUSTICE McCULLY.

The King vs J. H. Robertson. When this case was reached on the calling of the calendar the first day of the term His Excellency Attorney-General Ashford said that he asked leave to enter a nolle prosequi or that he desired to or moved to enter a nolle prosequi or to that effect, the precise words used not being then noted, giving as a reason therefor the absence from the kingdom of one Louis Magoney whom he styled the prosecuting witness.

The Court responded that it would take the matter of granting leave to enter the nolle prosequi under advisement, and upon the following day announced that it did not deem the absence of this witness a sufficient reason for not bringing the case to trial if he were not the sole witness on which the case depended, which was not alleged, and therefore declined leave of Court for the entry of a nolle prosequi.

Thereafter, Alfred S. Hartwell Esquire, requested the Court that he be allowed to appear in this matter. On the 6th of July Mr. Hartwell presented argument to the Court as "Counsel for the Attorney-General, on the right of the Attorney-General to decline to prosecute."

For the complete understanding of the position taken by the learned counsel for the Attorney-General, his brief is given in full on the 6th page of this Tuesday's issue of the GAZETTE.

BY THE COURT.

The proposition of the counsel for the Attorney-General that at the common law the Attorney-General of England and of States which have adopted this part of the common law has the right upon his sole responsibility to enter a nolle prosequi is not doubtful and has not been questioned by this Court.

But the common law is not in force as such in this Kingdom. This is not an English colony which has brought out the law of England to be in force here except as modified by express statute. The law of this country is found in our enacted statutes and in the precedents established by decisions of our Supreme Court, in which it is allowed, Section 823 of the Civil Code, "to cite and adopt the reasonings and principles of the admiralty, maritime and common law of other countries and also of the Roman or civil law so far as the same may be founded in justice and not in conflict with the laws and customs of this Kingdom." This doctrine has been frequently expressed by the Supreme Court. This part of the common law has not been enacted nor adopted here, nor could a duty and power of the Attorney-General be imposed or assumed or withdrawn upon consideration of what was the law of other countries.

The constant practice of the Supreme Court and of the Circuit Courts has been that the Attorney-General by himself or his deputy, when desiring to nolle pros. a case after indictment found, asks leave of the Court that it may be so entered, giving the Court or the presiding justice some satisfactory reasons therefor. These reasons are not always given publicly in the Court. They are frequently presented to the Judge in his office, and upon the motion being made in Court, the Court in response sometimes states the reason given, and sometimes merely says that for satisfactory reasons given the nolle pros. may be entered. I state this to be the custom of the Court upon my own knowledge as a Justice for twelve years and as a Deputy of the Attorney-General for four years, and upon inquiry of my brethren on the Bench, two of whom have held the office of Attorney-General, and who say that the practice has been uniformly as I have stated it.

Our statute of Criminal Procedure (Act of '76 C. L. p. 338) provides for the discharge without prosecution of persons imprisoned under committal for trial for any offense, by the Attorney-General's granting a certificate to the Justices or a Justice of the Supreme Court that he declines to present an indictment in the specified case, whereupon the Justice or Justices shall thereupon issue to the Marshal a warrant of discharge of such person from custody.

This statute was enacted in 1876, and as it provides only this method of discharge upon the sole responsibility and authority of the Attorney-General, I think it may be inferred that the existing practice was not intended by the Legislature to be varied in other respects.

The Court has control over a continuance of a case by Section 35 of the Criminal Procedure Act of 1876. "If the Court before which any person is indicted shall, upon the application of such person or otherwise, be of opinion that he ought to be allowed further time to plead, etc.," the Court may grant further time or continue to another term, certainly without the control of the Attorney-General.

Section 11 of the same Act gives the power to the Court to change the venue of any criminal proceedings to any other Court of Record, for such reasons as the justice of the case may require, and subject to such conditions as the Court may in its discretion impose. In regard to all which the Attorney-General would be heard but the decision and control would be of the Court.

The Act of 1866, now in force, defining the duties of the Attorney-General (C. L. p. 855) requires him to be vigilant and active in detecting offenders against the laws and to prosecute them with diligence. The law (Sections 1 and 2 of the Act of 1876) requires the Attorney-General to present the indictment before the next ensuing term after the commitment to the Judge who shall after examination certify upon each bill of indictment whether he finds the same a true bill or not.

What is the examination which the Judge is required to make?

There is no grand jury here and to some extent the Judge performs its functions. The evidence taken before the committing magistrate is submitted to him, and he hears statements from and makes inquiry of the Attorney-General to the extent of ascertaining if it is a case which ought to be tried. In the supposable case of its appearing that the evidence was frivolous and entirely unsupporting the charge, he would not find it a true bill, and the accused could not be put on trial. Or in the supposable case that the evidence being examined showed a case, say, of embezzlement when the indictment charged forgery, he would not approve the indictment for forgery.

Again if the form of the indictment was obviously defective though not charging a different offense from that presented in the evidence he would probably not find it a true bill. The Court's approval of the indictment as to form in no wise precludes or prejudices any showing by defendant's counsel that the indictment is faulty, and motions to quash or demur.

The Court's approval of the bill as being founded on evidence in no wise identifies the Court with the prosecution. I say this without hesitation on the part of every Judge living and dead who has occupied this Bench.

Examining the statutes previous to those now in existence—above referred to—the first is the statute of 1846 which organizes the executive departments, and by which the office of Attorney-General was first constituted and his duties prescribed (pages 264 et seq., Section VIII.), prescribes that every prisoner committed for trial shall be arraigned upon an indictment allowed by the Judge. . . . And (Section IX.) after plea the said Attorney-General shall, unless a postponement be granted for cause by the Court, proceed to make good by proof all or any of the counts in said indictment. So it appears that the Attorney-General had not the sole and exclusive control, now claimed, of the prosecutions, for he could not continue a case unless by leave of the Court granted for cause shown. An absolute power to continue a case, without cause shown and without leave, is equivalent to a power to continue and not prosecute at all. This he had not, but was commanded by the law to prosecute.

In a single instance under this statute was the power given to the Attorney-General to enter a nolle prosequi. (Section III.) "When a writ of habeas corpus shall have been issued by any Court of Justice, to inquire by examination of witnesses into the cause of the legality of the imprisonment of any alleged delinquent or criminal awaiting his trial the Attorney-General . . . shall attend to see that the alleged delinquent or criminal be not enlarged without just cause. He shall represent the prosecution in all such cases and he may, when the public interests require it, enter nolle prosequi against a suspected person." This statute is nearly equivalent to the statute of 1876 above cited. The rule of expressio unius est exclusio alterius well applies here. The authority is given expressly in a defined instance, viz.: of preliminary inquiry for commitment and is not given otherwise. The instance allowed is of a case not yet under indictment found. The general mandate of the law is that the Attorney-General shall prosecute.

By a joint resolution of the Legislature in 1846 subsequent to the passage of the organic acts in the same year, authority is given the Cabinet to appoint other public prosecutors, and to the Judges of the Superior Court to appoint district attorneys, pending the appointment of a new Attorney-General—the then Attorney-General, Mr. Ricord, it appears was about to leave the kingdom and his office was not filled.

In 1859 (Civil Code, Sections 1080-1095) the law provided only for district attorneys, an Attorney-General not being constituted by the Constitution of 1852. These district attorneys were appointed by the Justices of the Supreme Court for each judicial circuit of the Kingdom. They gave bond to the Chief Justice, they were commissioned for the term of two years, unless sooner removed by the Justices of the Supreme Court. They were required to prosecute offenses with diligence. No mention is made of a right to nolle prosequi.

By statute in 1862 the system of having an Attorney-General was restored. He was appointed by the King for a term of two years unless sooner removed by the King. His duties were prescribed to be those which had been performed by the district attorneys in Sections 1080-1095. No power is granted to nolle prosequi.

By the Constitution of 1864 an Attorney General was established, and he was made a member of the King's Cabinet (Art. 42); and in 1863 an Act was passed defining his duties. It is almost throughout in the same words as the Act of 1862. His duties are again referred to Sections 1080-1095. The Act would seem to have been passed solely to state his position as "being appointed by virtue of an article of the Constitution," but although thus placed for the first time under the Constitution and made a member of His Majesty's Cabinet, his duties in relation to prosecutions, and his status, rights, privileges and powers in the courts are unchanged from those of the officer who was created by statute only.

From this review of all the statutes touching the rights and duties of the Attorney General, I am of the opinion that the procedure which I have stated to be the custom of the Court and of the Attorney-General, is in accordance with our law, and accords with the interpretation hitherto given by the Court and the Attorney-General.

It is a well established precedent of practice based on the law. I cannot set it aside. If it does not now and further commend itself the Legislature can enact a statute authorizing another procedure.

The counsel for the Attorney-General says in argument: "If the judicial power can be extended to requiring the Attorney-General . . . to prosecute any specified case on penalty of fine or imprisonment this would not permit the exercise of executive and judicial powers to be preserved distinct—it would annul the discretionary and voluntary exercise of executive power, so far as the Attorney-General is concerned." This in my view is a misapprehension of the matter in discussion.

The Court has not ordered the prosecution of this case. It cannot and it will not do so. It has simply refused to approve and allow a motion for nolle prosequi upon the reason stated.

It has not and will not "fine or imprison an Attorney-General" for contempt by reason of not prosecuting a case.

It will be observed that I do not agree in terms with the statement in the opening of the argument of counsel—"The Attorney-General having nol. pros'd the case . . . the Court said its consent was required which it refused to give."

The Court said it would take time to consider (the reason offered) and it could not treat the motion as made otherwise than in accordance with the established precedent of practice and procedure. This difference in statement is however only the difference which constitutes this controversy on the part of the Attorney-General and his counsel. It is not a question of veracity as to facts.

Having thus given the opinion of the Court upon the abstract question argued by counsel, and holding against his contention, and he having made no argument addressed to the discretion of the Court upon its previous ruling to grant leave to nolle pros. the case of Robertson, that ruling might stand. But as this particular case has been virtually brought up by allowing the further argument to be made I have reconsidered that ruling.

I have examined the evidence given in the previous trial, excepting that of Magoney the absent witness. There are six witnesses besides him. On their testimony, if given in a magistrate's court, I should find a true bill of indictment. I express no opinion upon the proper or probable result of a trial. It is only an opinion that it is a case to be put on trial.

But this the Court cannot order. If, when it is called for trial, the Attorney-General, being present in person or by deputy, does not prosecute, it will stand not prosecuted in fact, but without the entry of nolle prosequi. The Attorney-General will take his own course.

If it shall proceed to trial, I will ask one of my brethren on the Bench to hold the trial, not because I deem myself to have, or to have indicated, any bias in the defendant's case, by withholding my concurrence to dismissing him without trial, but because by the collision which has arisen from this case, between the Court and the Attorney-General, a sensitive condition of public feeling has been induced, under which it might be imputed that my rulings were over strict against the defendant, urging his conviction, or were too favorable from fear of the other imputation. L. McCULLY,

Justice Supreme Court.

July 11, 1889.

When the foregoing had been read the Court said: Ten minutes before my coming into Court Mr. Hartwell saw me in my chambers, and being without information of what the decision was, desired me to make a statement. I think he can make it more accurately and I ask him to do so.

Mr. Hartwell—I desire to state that the Attorney-General had seen me before and desired me to inform the Court that the prosecution would go on with the case. Mr. Ashford's deputy informed me that Mr. Ashford desired the case to go on and defendant's counsel are present in Court. In regard to the suggestion that the Court desired one of its brethren to preside at the trial I desire that the Court itself shall sit at the trial. I think the interest of justice will be the better observed.

Mr. Neumann for the defendant—I shall ask that the Court sit, as we think it is entirely free from bias.

A large audience was present during the above proceedings, including the British Commissioner; but the Attorney-General was too ill to attend in person.

All the parties notified by the Court to be present were there, excepting the Attorney-General.

NATIVE HAWAIIANS IN UTAH.

How They are Treated by the Mormons—The Desire of Many to Return to Their Homes.

A young native, named John Kahaanui, who was one of the Hawaiian emigrants to Salt Lake, returned by the "Zealandia," having been assisted by our townsman Mr. W. A. Kinney to get to San Francisco, whence he was sent home by the Hawaiian Consul General. He states that there are about seventy natives there. A letter from Mr. Kinney at Salt Lake to the Consul-General says:

"As far as I can learn the natives are very well treated by the class of Mormons who still have enough zeal to proselytize, i. e. the rank religious Mormon, but there is a large class of Mormons in the city here who, like many of the descendants of the Missionaries at the Islands, are very busy laying up treasure where the moth and rust doth corrupt, etc., and don't look on our kanaka brethren at all, or, if at all, only as next door to the darkey, and to be treated accordingly. Some of the natives get steady work, others do not, and all have to work for their money as they never did at home. It is not a case of destitution but of homesickness. The Supreme Court of Utah has just held that native Hawaiians are not eligible to American citizenship, and this will greatly depreciate their importing value to the Mormons."

We are informed that quite a number of these emigrants desire to return, but have not the means to pay their way. Application has been made to the Consul-General at San Francisco, but it appears that there is not enough of the appropriation for the relief and return of indigent Hawaiians for this purpose, and furthermore that the appropriation is generally understood, to be for the return of shipwrecked seamen who are left abroad without means.

It is not thought to be a proper use of public money to aid homesick people who have voluntarily deserted their country to live abroad. This should serve as a warning to natives not to leave their homes without full knowledge of what they are going to, and full understanding that they cannot rely upon the Government to send for them when they are homesick.

CUSTOM HOUSE RETURNS.

Exports for the First Six Months of 1889.

Following are the returns of the Collector-General of Customs, showing the exports of the principal products for the second quarter, and also for the first half of the current year. During the past six months there has been a very large increase in the exports of Hawaiian products—especially in sugar, tallow, coffee, and bananas. On the other hand, there has been a considerable decrease in rice, and also in wool; but the decrease on the former, which is nearly one-third, may be accounted for from a much larger home consumption this year.

The total value of Hawaiian exports for the second quarter is $5,773,239 93, an increase over the corresponding quarter in 1888 of $1,215,516 58:

QUANTITIES AND VALUES OF THE PRINCIPAL DOMESTIC EXPORTS, FROM THE HAWAIIAN ISLANDS, FOR THE QUARTER ENDING JUNE 30, 1889, BY CUSTOMS DISTRICTS.

ARTICLES.	HONOLULU. Quantity.	HONOLULU. Value.	TOTAL ALL PORTS. Quantity.	TOTAL ALL PORTS. Value.
Sugar, pounds	72,744,084	$4,118,187 93	100,332 309	$5,616,397 01
Rice, pounds	2,102,100	99,430 24	2,107,100	99,430 24
Hides, pieces	6,812	19,362 43	6,912	1,604 11
Bananas, bunches	26,775	25,275 00	26,775	25,275 00
Goat Skins, pieces	1,606	819 60	1,663	819 65
Sheep Skins, pieces	1,436	156 40	1,436	156 40
Tallow, pounds	22,840	1,089 02	22,840	1,089 62
Molasses, gallons	9,040	1,238 00	9,040	1,238 00
Betel Leaves, boxes	74	376 00	75	376 00
Coffee, pounds	24,983	6,038 65	24,983	6,038 66
Taro Flour, pounds	3,004	275 00	3,000	275 00
Sundries		3,453 35		3,453 35
Total value		$4,274,068 16		$5,773,239 93

The following exports are included in the above table:

KAHULUI—Sugar, 21,721,274 pounds; value $1,140,021.99.

HILO—Sugar, 5,809,451 pounds, value $338,186.99; Rice 100 pounds; value $341.69.

DOMESTIC EXPORTS FROM THE HAWAIIAN ISLANDS—FIRST SIX MONTHS OF 1889, COMPARED WITH CORRESPONDING PERIOD OF 1888.

ARTICLES.	1889.	1888.	Increase.	Decrease.
Sugar, pounds	195,691,936	179,926,846	15,765,090	
Rice, pounds	4,328,600	6,415,800		2,087,100
Hides, pieces	12,860	11,114	1,746	
Bananas, bunches	48,401	36,080	12,321	
Wool, pounds	23,697	320,356		296,660
Goat Skins, pieces	5,183	5,795		612
Sheep Skins, pieces	3,314	3,496		182
Tallow, pounds	70,030	44,994	25,036	
Molasses, gallons	14,004	12,920	1,086	
Betel Leaves, boxes	266	192	74	
Coffee, pounds	27,118	2,600	24,698	
Cattle, head	97		97	
Taro Flour	3,706	178	3,529	
Awa, pounds		6,338		6,338

The United States steamer Constellation went ashore a mile below Cape Henry in a thick fog. The vessel was broadside to the beach, three hundred yards from shore. Wrecking companies sent vessels to the rescue, but she got off without much injury.

BOUND VOLUMES

—OF THE—

Hawaiian Gazette

—AND—

Daily P. C. Advertiser

For Sale at the office of Publication, No. 46 Merchant street, Honolulu.

July, 1889. d&w